

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Rafael Castillo-Sanchez,

Case No.: 2:18-cv-01598-JAD-NJK

Petitioner

Order Denying Motion to Dismiss

Dwight Neven, et. al.,

[ECF No. 26]

Respondents

8 Counseled petitioner Rafael Castillo-Sanchez petitions for a writ of habeas corpus under
9 28 U.S.C. § 2254, arguing that his trial counsel failed to prepare and investigate his case, his trial
10 counsel failed to investigate and present a mental health or insanity defense, and his trial and
11 appellate counsel failed to challenge three jury instructions.¹ Respondents move to dismiss as
12 unexhausted ground 3(a)—Castillo-Sanchez’s claim that trial counsel failed to challenge three
13 jury instructions.² I find that ground 3(a) is exhausted, so I deny Respondents’ motion.

Background

15 Castillo-Sanchez challenges his 2010 conviction after a jury trial of first-degree murder
16 with the use of a deadly weapon and assault with a deadly weapon.³ Castillo-Sanchez was
17 sentenced to, *inter alia*, life without the possibility of parole.⁴ He appealed, and the Nevada

¹ ECF No. 21.

² ECF No. 26 at 5.

23 ||³ ECF No. 30-29.

4 Id.

1 Supreme Court affirmed.⁵ Castillo-Sanchez filed a state petition for post-conviction relief.⁶ The
 2 state district court denied the petition,⁷ and the Nevada Supreme Court affirmed.⁸

3 Castillo-Sanchez dispatched his federal habeas corpus petition on January 9, 2019.⁹ I
 4 appointed counsel for him,¹⁰ and a first amended petition was filed.¹¹ Respondents now move to
 5 dismiss ground 3(a) as unexhausted.¹²

6 Discussion

7 Because a federal habeas petitioner incarcerated by a state must give state courts a fair
 8 opportunity to act on each of his claims before he presents them in a federal habeas petition,
 9 federal courts will not consider his petition for habeas relief until he has properly exhausted his
 10 available state remedies for all claims raised.¹³ A claim remains unexhausted until the petitioner
 11 has given the highest available state court the opportunity to consider the claim through direct
 12 appeal or state collateral-review proceedings.¹⁴ To properly exhaust state remedies on each
 13 claim, the habeas petitioner must “present the state courts with the same claim he urges upon the
 14 federal court.”¹⁵ The federal constitutional implications of a claim, not just issues of state law,

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 16⁵ ECF No. 31-7.

17⁶ ECF Nos. 31-17, 31-30.

18⁷ ECF No. 32-2.

19⁸ ECF No. 32-25.

20⁹ ECF No. 4.

21¹⁰ ECF No. 12.

22¹¹ ECF No. 21.

23¹² ECF No. 26.

¹³ See *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998).

¹⁴ *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

¹⁵ *Picard v. Connor*, 404 U.S. 270, 276 (1971).

1 must have been raised in the state court to achieve exhaustion.¹⁶ A claim is not exhausted unless
 2 the petitioner has presented to the state court the same operative facts and legal theory upon
 3 which his federal claim is based.¹⁷

4 Respondents contend that Castillo-Sanchez only alleged in his state post-conviction
 5 proceedings that his *appellate* counsel was ineffective for failing to challenge jury instructions 7,
 6 8, and 28, whereas ground 3(a) of his federal petition alleges that *trial* counsel was also
 7 ineffective regarding jury instructions 7, 8, and 28.¹⁸ It is true that in its order affirming the
 8 denial of Castillo-Sanchez's state petition, the Nevada Supreme Court articulated Castillo-
 9 Sanchez's instant claim as one against only appellate counsel: "Castillo-Sanchez next argues that
 10 appellate counsel should have challenged the jury instructions on implied malice, premeditation,
 11 and equal and exact justice."¹⁹ And indeed, the Nevada Supreme Court denied that claim as
 12 against appellate counsel only: "we conclude that Castillo-Sanchez has failed to show that
 13 appellate counsel was ineffective in failing to raise these futile challenges."²⁰

14 And in fact, in his counseled supplemental petition for post-conviction relief before the
 15 state district court, Castillo-Sanchez titled the instant ground for relief as an "ineffective
 16 assistance of appellate counsel" claim.²¹ However, significantly, within his discussion of each
 17 jury instruction—7, 8, and 28—Castillo-Sanchez discussed *trial* counsel's failures: (1) "Mr.
 18

19¹⁶ *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014); *Castillo v. McFadden*, 399 F.3d 993,
 20 999 (9th Cir. 2005) (fair presentation requires both the operative facts and federal legal theory
 upon which a claim is based).

21¹⁷ *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994).

22¹⁸ ECF No. 26 at 6.

23¹⁹ ECF No. 32-25 at 5.

²⁰ *Id.* at 5–6.

²¹ ECF No. 31-30 at 21.

1 Sanchez received ineffective assistance of counsel for failing to object to this jury instruction at
2 trial,” (2) “Mr. Sanchez received ineffective assistance of counsel for trial counsel’s failure to
3 object to this improper instruction,” and (3) “Mr. Sanchez received ineffective assistance of trial
4 counsel for counsel’s failure to object to this instruction.”²² Castillo-Sanchez’s opening brief to
5 the Nevada Supreme Court on appeal mirrored his supplemental petition before the state district
6 court.²³ Accordingly, although Castillo-Sanchez may have only included appellate counsel in
7 the title of his claims before the state district court and Nevada Supreme Court, he presented the
8 state district court and Nevada Court of Appeals with his trial counsel argument within the
9 discussion of his claims. Castillo-Sanchez has thus presented the state courts with the same
10 claim he now urges in ground 3(a).²⁴ Ground 3(a) is exhausted.

Conclusion

12 IT IS THEREFORE ORDERED that respondents' motion to dismiss [ECF No. 26] is
13 **DENIED.**

IT IS FURTHER ORDERED that respondents have 60 days from the date of this order in which to file an answer to Castillo-Sanchez's first amended petition. The answer must contain all substantive and procedural arguments and comply with Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. § 2254. Castillo-Sanchez will then have 30 days from the date of service of respondents' answer to file a reply.

U.S. District Judge Jennifer A Dorsey
May 2, 2022

²² *Id.* at 23–25.

²³ ECF No. 32-6 at 42, 45, 47–48.

²⁴ *Picard*, 404 U.S. at 276.